

Military commissions resume against alleged 9/11 conspirators

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This week saw the resumption of pre-trial motions in the military commission prosecution of the alleged 9/11 conspirators at the US Naval base in Guantanamo Bay, Cuba.

The proceedings have rightfully earned international scorn for their failure to ensure the most basic components of due process, including the right to consult with an attorney, the right to confront hostile witnesses and evidence, and the right to subpoena witnesses and evidence favorable to the defendants. It is a legal proceeding in name only, which aims to dispense with the defendants without exposing even more evidence of torture, abuse and other malfeasance by the US government. Comparisons to the Star Chamber and Kafka's *The Trial* are appropriate.

The majority of the proceedings this week involved arguments by the five defense attorneys, one for each defendant, about a number of procedural and evidentiary grievances.

The commission hearing the case is protected by a fortress. Triple-layer soundproof glass separates Judge James Pohl, the prosecutors and the defense attorneys from the gallery. The audience hears the proceedings through speakers, but at a delay of 40 seconds. In front of the judge there is a red light bulb connected to a button, which he or the head of security can press to cut the audio feed should any "sensitive information" be uttered by a witness.

During similar hearings in January this censoring device was apparently activated by someone outside of the courtroom, and at a moment when the testimony concerned the secret CIA "black sites" where some of the defendants were held before being transferred to Guantanamo Bay in September 2006. Judge Pohl denied knowledge of any remote censor switch, asserting that he alone had authority concerning public

access to the hearings.

In February, it came to light that the attorney-client meeting rooms at Guantanamo Bay featured highly sensitive microphones and cameras hidden inside phony smoke detectors. The microphones are so sensitive that they can pick up whispers, and the cameras can even see the handwritten notes that the lawyers and their clients exchange. This amounts to a blatant and brazen violation of the defendants' Sixth Amendment right to counsel, which, as the Supreme Court has held, is meaningless without attorney-client confidentiality.

Commanders at Guantanamo testified this week that correspondence between the accused and their attorneys was also subjected to search.

In April, attorneys for the defendants successfully moved for a delay in the pretrial hearings after learning that 500,000 of their own internal emails had been seized and their files had disappeared from computer servers. It appears that this breach of attorney-client privilege came at the hands of the Department of Defense. In any civilian court, this type of conduct would likely result in a mistrial, not to mention the filing of criminal charges.

There are innumerable other aspects of the proceedings that preclude any semblance of a fair trial for the defendants. Secret evidence, hearsay testimony, and confessions obtained by torture may be admitted. The accused are routinely excluded from hearings on evidence at which they are entitled to be present, placing them at further disadvantage in preparing a defense.

Attorney James Connell, who represents defendant Ammar Al Baluchi, told the court that due to rules on classified information he was unable to discuss a 2007 FBI interview of his client with him. He said much of

the evidence against Al Baluchi is based on this interview. That he cannot discuss this with his client makes his job nearly impossible, and imperils his client's fate.

Connell and the other defense attorneys argued this week for a ruling from the court directing the International Committee of the Red Cross (ICRC) to produce documents in its possession about the treatment of the defendants during their detention at Guantanamo Bay before the trial. Both the prosecution and the ICRC strenuously oppose the production of these documents, which would almost certainly document extensive torture. The horrific conditions the defendants faced as detainees in CIA black sites are now facts of general public knowledge, confirmed by numerous sources. To take one example, alleged 9/11 mastermind and defendant Khalid Sheik Mohammed was waterboarded nearly 200 times.

This evidence could have enormous exculpatory value for the defendants, all of whom face the death penalty if convicted. Furthermore, the evidence of torture as pre-conviction punishment could be essential for the purpose of mitigating any sentence handed down to the defendants, potentially saving them from the death penalty.

Attorney Walter Ruiz, who represents Mustafa al-Hawsawi, the alleged funding coordinator for the 9/11 terror attacks, argued that he did not know any other way to obtain the crucial information he sought other than through the ICRC. He and his colleagues requested the documents six months ago.

Prosecutors hope that the trial itself will begin in late 2014, an unlikely prospect given the extent of malfeasance so far and the snail's pace of this week's hearings, frequently interrupted by technical difficulties.

Ruiz said it could be as long as three to five years before the trial starts. Whenever it does, one cannot expect that it will be any less a travesty of justice than the proceedings to date have been.



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